

BRB No. 91-1262

DONALD HUDSON, JR.)
)
 Claimant-Petitioner)
)
 v.)
)
 PUERTO RICO MARINE,)
 INCORPORATED)
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 and)
)
 NATIONAL UNION FIRE INSURANCE) DATE ISSUED:
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION AND ORDER

Appeal of the Final Decision and Order Denying Benefits and Order Denying Relief on Motion for Reconsideration of George A. Fath, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Benford L. Samuels, Jr. (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Final Decision and Order Denying Benefits and Order Denying Relief on Motion for Reconsideration (90-LHC-1676) of Administrative Law Judge George A. Fath on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured in a train collision while working for employer on February 5, 1986, and claimant filed a claim for benefits under the Act. Subsequently, claimant sought protection from creditors by filing for bankruptcy, and he also filed a third party suit against the railroad company pursuant to Section 33 of the Act, 33 U.S.C. §933. On July 7, 1988, employer, carrier and claimant entered into a joint petition for approval of an agreed settlement of the claim for compensation under the Act. *See* 33 U.S.C. §908(i). The agreement provided for employer's payment of \$40,000 to claimant, of which \$5000 was to be an attorney's fee, plus \$5000 for future medical expenses. In the settlement, employer reserved a right to a lien on the proceeds on any third party action.

After executing the joint petition for settlement, employer discovered that claimant was in bankruptcy and had accepted an offer of \$75,000 in settlement of his third party suit. Employer initially refused to comply with the settlement provisions, but claimant moved for enforcement of the settlement, and in a Decision and Order Approving Settlement, Administrative Law Judge John M. Vittone approved the settlement and ordered employer to pay claimant accordingly.

Employer thereafter filed two proofs of claim with the bankruptcy court. The first one was for \$35,000; after negotiating with claimant's attorney, employer agreed to reduce its claim on the proceeds of the third party settlement to \$17,500. As claimant was solvent, the bankruptcy court paid employer the \$17,500, as well as paying claimant's two other creditors, and it paid all creditors interest calculated at 8.55 percent from the date of the filing of the petition in bankruptcy to the date of disbursement pursuant to 11 U.S.C. §726(a)(5). Specifically, employer was paid \$18,871.56 representing principal in the amount of \$17,500, and interest of \$1,371.06. Claimant thereafter filed a claim under the Act to recover the interest, maintaining that his compensation under the Act was improperly diminished under Section 16, 33 U.S.C. §916. The administrative law judge denied claimant's request to recover the \$1,371.06 in interest and denied claimant's motion for reconsideration.

In denying claimant's request, the administrative law judge first found that the Section 8(i) settlement had been fully executed, and that by virtue of claimant's filing for bankruptcy, employer was forced to pursue its lien against the third party recovery in the bankruptcy forum. *See* 33 U.S.C. §933(f). The administrative law judge noted that claimant, although solvent, did not move to dismiss his bankruptcy action, nor did he object to the order of distribution which provided for the interest payment to creditors. Thus, the administrative law judge concluded that claimant cannot now collaterally attack the order of the bankruptcy court.

Further, the administrative law judge rejected claimant's argument that Section 16 of the Act, 33 U.S.C. §916, precludes the award of interest on employer's lien.¹ Claimant argued that the interest awarded by the bankruptcy court is actually compensation and as such cannot be assigned or claimed by creditors under Section 16. The administrative law judge, however, found that Section 16 is not applicable since Section 33 expressly provides for a lien by employer in cases of third party settlements. *See* 33 U.S.C. §933(f). In conclusion, the administrative law judge found that employer was entitled to the \$1,371.56 in interest awarded by the bankruptcy court. The administrative law judge denied employer's request for fees and costs under Section 26, 33 U.S.C. §926.

On appeal, claimant seeks recovery of the interest, a penalty pursuant to Section 14(f), 33 U.S.C. §914(f), an attorney's fee, and interest on the interest award. Claimant contends as he did below that the interest of \$1,371.56 is actually compensation and, as such, is immune from recovery by employer under Section 16. Citing *Henderson v. Glens Falls Indemnity Co.*, 134 F.2d 320, 321 (5th Cir. 1943), *cert. denied*, 319 U.S. 756 (1943), for the proposition that the Longshore Act prevails over a court order, claimant contends the Longshore Act prevails over bankruptcy law.² Claimant additionally contends that his being in bankruptcy did not harm employer as, in third party claims, employers typically wait for the outcome of suits to recover their liens. Claimant also contends that while Section 33(e), 33 U.S.C. §933(e), specifies costs employer can recover in addition to its lien, *i.e.*, attorney's fees, medical benefits actually furnished to an employee, and amounts paid as compensation pursuant to Section 33(e)(1)(c), it does not mention interest, so interest may not be recovered. Claimant also asserts that the bankruptcy court can only address assets actually before it and therefore the bankruptcy court cannot dispose of assets such as workers' compensation benefits which compensate future wage loss. Employer responds that the administrative law judge properly found that the bankruptcy order cannot be collaterally attacked as claimant did not object before the bankruptcy court, and the bankruptcy order is not "void."

We hold that the administrative law judge properly found that claimant is not entitled to recover the interest awarded by the bankruptcy court. Contrary to claimant's assertion, the award of interest by the bankruptcy court does not conflict with Section 16 or Section 33, or with any other section of the Longshore Act. As the administrative law judge found, Section 16, which precludes assignment of compensation or collection of compensation by creditors *except as provided by the*

¹Section 16 provides that no assignment, release, or commutation of compensation or benefits due or payable under the Act, except as provided by the Act, shall be valid, and that such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of debt, which exemption may not be waived.

²In *Henderson*, the United States Court of Appeals for the Fifth Circuit ruled that a court-authorized settlement was rendered ineffective because Section 15(b), 33 U.S.C. §915(b), and Section 16 prohibited settlements. Section 8(i) subsequently was enacted to permit settlements under certain circumstances. Thus, we reject claimant's argument that the case stands for the principle cited.

Act is not applicable, as claimant has not demonstrated that the interest paid to employer is "compensation." At the time of the distribution by the bankruptcy court, the Section 8(i) settlement between claimant and employer was fully executed, and all of the money was already an asset of claimant's and was part of the bankruptcy estate. None of the funds distributed to the creditors was a present or future payment of compensation. Thus, the interest payment to claimant does not diminish the approved Section 8(i) settlement in violation of Section 16. Moreover, employer's lien under Section 33(f) was on the proceeds of the third party settlement. As Section 33(a) refers to third party suits for "damages," no part of employer's lien or the interest awarded thereon can be considered "compensation" within the meaning of Section 16.³

Moreover, as the administrative law judge found, claimant had the opportunity to challenge the order of distribution in the bankruptcy court but failed to do so. Under bankruptcy law, even if the bankruptcy court's award of interest was erroneous, provided it was not "void," claimant is collaterally estopped from attacking the bankruptcy court's judgment where he had the opportunity before the bankruptcy court to protest any of the proceedings and did not avail himself of it. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940); *Universal Display Sign Co. v. Del Mar News Agency*, 541 F.2d 142 (3d Cir. 1976); *In re French Gardens, Ltd.*, 58 B.R. 959 (Bankr. S.D. Tex. 1986). Under such circumstances, the order of the bankruptcy court is *res judicata* against collateral action. *See, e.g., Universal Display Sign Co.*, 541 F.2d at 144. In this case, there is no evidence that the award of interest is void or that it was erroneous. Rather, the award of interest is consistent with bankruptcy law which provides that interest may be awarded on the claims of creditors if the bankrupt ultimately proves solvent. *See, e.g., In re Sublett*, 895 F.2d 1381 (11th Cir. 1990); *In re San Joaquin Estates, Inc.*, 64 B.R. 534 (Bankr. 9th Cir. 1986); *In re Boston and Maine Corp.*, 719 F.2d 493 (1st Cir. 1983), *cert. denied*, 466 U.S. 938 (1984); 11 U.S.C. §726(a)(5). Thus, we hold that the administrative law judge properly concluded that the interest award of the bankruptcy court is not subject to collateral attack, and that claimant is not entitled to recoup the interest paid to employer.

³Although Section 33(e) does not mention interest, this section is not applicable because it addresses a situation where an award has been issued and the rights of the person entitled to compensation to pursue a remedy for damages against a third party is assigned to employer under Section 33(b).

Accordingly, the administrative law judge's Final Decision and Order Denying Benefits and Order Denying Relief on Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge